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Informal Preparatory Meeting of the Ad Hoc Committee for the Negotiation of a Convention against Corruption
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Proposals and contributions received from Governments

Argentina: proposed chapter on preventive measures

Article [...]
Code of conduct

1. States Parties undertake to adopt codes of conduct for the correct, honourable and proper behaviour of public officials.

2. Such codes shall include rules:

(a) Requiring the reporting to the appropriate authorities of acts of corruption in the discharge of public functions by persons having a knowledge thereof in the performance of their duties;

(b) Preventing the improper use of public monies, property, services or information that is acquired in the performance or as a result of their official duties for activities not related to their official work;

(c) Prohibiting them from soliciting or receiving, directly or indirectly, for themselves or for their close relatives any gifts or other favours or benefits that may influence the impartial exercise of their functions.

Sources: International Code of Conduct for Public Officials (General Assembly resolution 51/59, annex).
Inter-American Convention against Corruption (see E/1996/99), art. III.
Model Code of Conduct for Public Officials (see *Official Gazette of the Council of Europe: Committee of Ministers part-volume*, No. V—May 2000, recommendation No. R (2000) 10).

Article [...]
Conflict of interest

1. Each State Party shall adopt rules on conflict of interest in order to prevent public officials from taking decisions that may give rise for themselves or

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for their close relatives to a benefit of any kind arising from a conflict between their public office and their private interests.

2. The rules on conflict of interest shall include:

(a) Measures laying down courses of action to reduce or eliminate situations where the impartiality of public officials may be affected. Such measures may include a requirement to refrain from acting in certain situations, the establishment of blind trusts and the implementation of mechanisms to guarantee transparency in decision-making processes;

(b) The obligation that public officials regularly make public declarations of their business, commercial or financial interests and their employment activities and record;

(c) Measures to prevent public officials from finding themselves in conflict of interest situations after they have ceased to hold public office.

Sources: International Code of Conduct for Public Officials.
Model Code of Conduct for Public Officials.

Article [...]
Sworn declarations of assets

1. States Parties undertake to adopt rules that provide for systems for the regular declaration of assets and liabilities of public officials and of their spouses and dependants.

2. The rules shall include a procedure for making public such declarations that ensures that the right to privacy and safety of public officials and their families is not unreasonably impaired.

Sources: International Code of Conduct for Public Officials.
Inter-American Convention against Corruption, art. III.
Model Code of Conduct for Public Officials.

Article [...]
Public procurement

Each State Party shall adopt such legislative, administrative or other measures as may be necessary to establish a public procurement system based on rules of transparency. Such measures may include:

(a) Mechanisms to enable the correct identification of the needs to be met through public procurement;

(b) Systems for the distribution of and access to information relating to tenders in progress and awarded contracts;

(c) Public procurement systems based on the use of objective criteria for the selection of contractors and the awarding of contracts;

(d) Systems that make it possible to detect and prevent the inclusion in bidding conditions of clauses that unlawfully restrict competition or equality among bidders;

(e) Mechanisms that make possible the broad participation of interested parties in the stages of drawing up bidding conditions with the aim of improving efficiency in public procurement administration;

(f) Mechanisms that enable public procurement administration to be monitored by civil society;

(g) Adoption of effective remedies and sanctions that make transparency in public procurement administration consistent with the required degree of efficiency in the management of public affairs.

Sources: United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex I), art. 31, para. 2 (c).
Inter-American Convention against Corruption, art. III, para. 5.
The Twenty Guiding Principles for the Fight against Corruption (see Council of Europe, *Texts adopted by the Committee of Ministers of the Council of Europe, 1997*, Strasbourg, France, 1998, resolution (97) 24), para. 14.

Article [...]
Transparency in processes for the adoption of acts of government

Each State Party shall adopt such legislative, administrative or other measures as may be necessary to improve public scrutiny of acts of government through means such as:

(a) The implementation of public discussion and consultation mechanisms that allow for the participation of non-governmental organizations, sectoral entities and the general public in government decision-making processes;

(b) The promotion of public information activities that contribute to improving the public's awareness of the forms that corruption takes, the costs for society to which it gives rise and the mechanisms for preventing corrupt practices.

Sources: United Nations Convention against Transnational Organized Crime, art. 31, para. 5.
The Twenty Guiding Principles for the Fight against Corruption, para. 9.

Article [...]
Special bodies for the prevention of corruption

States Parties shall consider the establishment, within their respective legal systems, of special multidisciplinary bodies for the prevention of corruption. Such bodies shall undertake diagnostic surveys and studies, make proposals and implement systems of transparency in public administration.

Article [...]
Access to information

States Parties that have not yet done so shall adopt such legislative or other measures as may be necessary to promote broad public access to information in the possession of the State, subject to any exceptions and limitations laid down by the respective institutional systems.

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Proposals and contributions received from Governments

Belarus: proposals concerning the future United Nations Convention against Corruption

1. The draft of the future convention must be an independent and broad instrument with binding force, drawn up taking account of all the instruments agreed under United Nations auspices that are aimed at uniting the efforts of the international community in the fight against corruption, including the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex I).

2. In the light of the opinion of those developing the draft convention regarding the utility of including in the text sanctions to be imposed as punishment for illegal acts in the form of penalties under criminal, administrative and civil law, the future convention should be drawn up exclusively on the basis of respect for state sovereignty, territorial integrity and non-interference in the internal affairs of States.

3. In order to simplify the procedures for signing and subsequently acceding to the convention and also for making any amendments or additions to national legislation, Belarus considers that, in the process of drafting the future convention, account should be taken of the differences that exist between national legal systems.

4. The scope of application of the convention should include not only acts related to corruption and falling within the definition of transnational organized crime, but also those forms of corruption not classifiable in that category of criminal offences.

5. Particular emphasis in the preparation of the draft should be placed on the set of preventive measures. It is proposed that the bulk of the draft be devoted to measures to prevent corruption and that they be drawn up with the assistance of a wide circle of experts, including experts in the spheres of banking and finance.

6. The question of criminalizing acts related to corruption is one of fundamental importance. Ensuring that the draft includes the widest possible grounds and conditions for criminal responsibility will make it possible to harmonize the

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national legislations of Member States and guarantee their successful cooperation in the realm of international law.

7. The provisions of the future convention should make for strengthened cooperation among the parties thereto with a view to curbing and combating corruption in its different forms.

8. The text of the convention should include a set of measures aimed at encouraging the employees of banking, credit and financial institutions to detect and prevent the commission of various illegal money-laundering transactions.

9. The convention should set out criteria for the return of funds of illicit origin.

10. Accordingly, the structure of the future draft convention should include the following main elements:

1. Definitions.
2. Scope.
3. Protection of sovereignty.
4. Measures to prevent corruption.
5. Criminalization.
6. Sanctions.
7. Jurisdiction.
8. Liability of legal persons.
9. Protection of witnesses and victims.
10. Inapplicability of bank secrecy.
11. Mutual legal assistance.
12. Joint investigation.
13. Collection, exchange and analysis of information (including establishment of criminal record).
14. Extradition.
15. Transfer of criminal proceedings.
16. Transfer of sentenced persons.
17. Prevention of the cross-border transfer of funds of illicit origin (with no restriction of or restraint upon the free flow of licit funds).
18. Detection, seizure, confiscation and return of proceeds from corruption (including criteria for determining the States of origin of such proceeds).
19. Disposal of confiscated proceeds.
20. Technical assistance.
21. Relation with other international treaties.

11. The draft convention should also include provisions allowing for the possibility of supplementing it with protocols and instruments of other types forming an integral part of the future convention.

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Proposals and contributions received from Governments

Turkey: proposed draft of the United Nations Convention against Corruption

United Nations Convention against Corruption

Article 1
Aim

The aim of this Convention is to prevent corruption and to promote cooperation for a more effective fight against corruption.

Article 2
Definitions

For the purposes of this Convention:

(a) "Public official" shall mean any elected or appointed person who, in accordance with the scope of the penal law of the country concerned is considered an official exercising a public office or serves as a member of a public institution in the executive, legislative or judiciary fields;

(b) "Public works" shall refer to the works carried out in each State Party and in its affiliated organizations;

(c) "Assets" shall refer to all kinds of property, material or immaterial, moveable or immoveable, tangible or intangible, legal documents and instruments that certify the ownership of such property or documents related to such property;

(d) "Proceeds" shall refer to money, legal instruments taking the place of money and all kinds of documents documenting such;

(e) "Freezing" or "seizure" shall mean temporarily prohibiting the transfer, conversion, selling or moving goods based on the order of a court or another

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another authorized body or the temporary placing of the goods under the trusteeship or control of it;

(f) "Confiscation" shall refer to the permanent confiscation of assets based on the order of a court or another authorized body, including delivery, as appropriate.

Article 3
Scope

This Convention shall apply to the commitment of crimes of corruption within national borders as well as internationally.

Article 4
Area of implementation

1. Each State Party shall perform its obligations under the scope of this Convention consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. The provisions of this Convention shall not enable a State Party to use the authority of jurisdiction within the territory of another State Party and to execute functions that were reserved exclusively for the authorities of that other State.

Article 5
Criminalization of corruption

1. Each State Party shall take the necessary legislative and other administrative measures to criminalize the actions listed below, in accordance with basic principles of its domestic law:

(a) Promising, offering or giving a benefit to a public official, directly or indirectly, to the official himself or herself or to an organization in order to make that official perform or refrain from performing his or her official duties;

(b) Requesting or accepting a benefit by a public official, directly or indirectly, to the official himself or herself or to an organization in order to make that official perform or refrain from performing his or her official duties;

(c) Requesting or accepting a benefit by a public official under the assumption that the official shall directly or indirectly perform a duty that is not within his or her capacity or something the official is not authorized to perform or not to perform;

(d) Consciously acting as a mediator for the promising, offering, giving, requesting or accepting of the unlawful benefit listed in subparagraphs (a), (b) and (c) of this paragraph;

(e) Providing benefit to oneself or others in public works by deceiving a person through tricks and intrigue or causing harm to that person or to others;

(f) Providing a credit that shall not be assigned by banks and other financing institutions or stopping a loan that needs to be assigned or to attempt such behaviour consciously;

(g) Providing benefit for oneself or others by using things that have been entrusted or delivered as a return or to be used temporarily, yet belonging to someone else, in public works;

(h) The promising, giving or offering, when committed intentionally, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert improper influence over the decision-making of any person, whether the undue advantage is for himself or herself or anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.

2. Each State Party shall adopt all legislative and administrative measures necessary in its domestic legislation to regard as illicit enrichment, and thereby to criminalize, any significant increase in the assets and income of any public official that is not in conformity with his legal earnings derived from his duties and that has no other reasonable explanations as to its source.

3. Each State Party shall adopt all legislative and administrative measures necessary in order to criminalize the behaviours listed in paragraph 1 of this article when committed against a foreign public official or when such action involves an international public official.

4. Each State Party shall adopt all legislative and administrative measures necessary in order to consider any contribution to the commitment of the crimes set forth in this article as taking part in the crime.

5. Each State Party shall adopt all legislative and administrative measures necessary in order to criminalize the laundering of all kinds of proceeds that have been obtained from the crimes set forth in paragraph 1 of this article.

6. Each State Party shall adopt all legislative and administrative measures necessary in order to make possible more severe punishment and to apply effective methods against corruption whenever the crimes listed in paragraph 1 of this article are committed by an organization.

7. Each State Party, in accordance with its domestic law, shall adopt all the legislative and administrative measures necessary to prosecute and punish persons who take part in the commitment of the crimes established in this Convention and to extend the application of the relevant provisions of this Convention to such persons, irrespective of the status of a public official, whenever the economic activities or transactions involved include or result in the use of public resources or produce results that affect the public or aim at the provision of public services.

Article 6
Measures against corruption

1. In addition to the measures set forth in article 5 of this Convention, each State Party shall take the necessary legislative, administrative and other effective measures to the extent possible and in compliance with its own legal system to promote integrity and to prevent, detect and punish acts of corruption.

2. Each State Party shall take all the necessary measures, including independence for its own public organizations, in order for them to take the

effective measures mentioned in paragraph 1 of this article and to perform effective local inspection.

3. Each State Party shall adopt the required regulations to provide transparency in public assets and service purchases, bidding laws and all public expenditure in order to prevent corruption and shall take the necessary measures in that regard.

4. In order to prevent corruption, each State Party shall take the legislative and administrative measures necessary for public officials and private persons and legal entities that are parties to public affairs to report to the State on a regular basis the assets and proceeds they have acquired.

Article 7
Liability of legal persons

Each State Party shall take the penal, legislative or administrative measures necessary, in accordance with principles of its domestic law, concerning legal persons, in the event that they contribute to the commitment of crimes set forth in article 5 of this Convention.

Article 8
Judicial authority

1. Each State Party shall take the measures required for it to exercise its own judicial authority concerning crimes in accordance with Article 5 of this Convention whenever:

(a) The crime is committed on the territory of that State Party; or

(b) The crime is committed on a ship carrying the flag of that State Party or at the time the crime is committed it is committed on a plane registered in accordance with the laws of that State Party.

2. Each State Party shall implement the measures required for it to exercise its own judicial authority concerning the crimes that are under the scope of this Convention in the event that the accused is within its territory and it shall not return such persons solely on the ground that the person is the citizen of the other State.

3. Each State Party shall, moreover, implement the measures required for it to exercise its own judicial authority concerning the crimes when the person accused of the crimes is found within its territory and shall not return such person.

4. While exercising its own judicial authority, if a State Party is warned or finds out that one or more State Party is conducting an investigation or a judicial examination concerning the same act, the relevant authorities of that State Party shall consult with the authorities of the other State Party in order to coordinate their activities in cases as appropriate.

5. Provided that the norms of general international law are respected, this Convention shall not exclude the use of any judicial authority established in accordance with its domestic law by a State Party.

Article 9
Prosecution, adjudication and sanctions

1. Each State Party shall establish penalties taking into account the damage the actions have caused, while regulating the sanctions for the crimes determined in article 5 of this Convention.

2. Each State Party shall, to the extent permitted by its domestic law, leave the conduct of trials for crimes under the scope of this Convention to courts that are specialized in such matters.

3. Each State Party shall, to the extent permitted by its domestic law, adopt the required regulations that provide for public officials accused of crimes under the scope of this Convention, to leave their work until the end of the trial, where necessary.

4. Each State Party shall, to the extent permitted by its domestic law, adopt the regulations necessary for it to keep the lapse of time of the cases and penalties concerning the crimes that are under the scope of this Convention as wide as possible, pro rata to the damages caused by those crimes.

5. Each State Party shall take into consideration the negative results caused by corruption while evaluating the early release or parole of persons convicted of crimes covered by this Convention.

Article 10
Confiscation and seizure

1. States Parties shall adopt all legislative and administrative measures necessary to enable seizure of:

(a) All kinds of proceeds of crime or assets that correspond to the value of the proceeds obtained from crimes covered by this Convention;

(b) Values or products or instrumentalities that correspond to such that have been allocated or spent for the commitment of the crimes covered by this Convention or that have been used in the commitment of the crime or arising from the crime.

2. States Parties shall take the measures necessary to ensure the identification, tracing, freezing or confiscation of the assets or proceeds described in paragraph 1 of this article.

3. If the assets or proceeds described in paragraph 1 of this article have been transformed or merged with legal assets or proceeds, corresponding assets shall be seized or confiscated.

4. States Parties shall be able, to the extent allowed by principles of their domestic law, to require that an accused person indicate the legal source of the revenues or assets that are suspected of being gained from crime or such other assets that are subject to seizure.

5. The provisions of this article shall not be interpreted in such a manner as to prejudice the rights of bona fide third persons.

Article 11
International cooperation for purposes of confiscation

1. Each State Party, upon receipt of a request from another State Party, for those purposes set forth in article 10, paragraph 1, of this Convention shall:

(a) Submit the request to its own authorized officials in order to obtain an order of seizure; or

(b) In the event the assets subject to the request are within its own territory, submit the order of seizure given by the authorized officials of the requesting State Party to its own authorized officials for the application of seizure to such assets.

2. The State Party where the assets shall be obtained under the scope of this Convention and where the assets listed in article 10, paragraph 1, of this Convention are situated shall take the measures required to identify, trace, freeze or confiscate such assets for their seizure upon the request of another State Party.

3. The orders of seizure set forth in paragraphs 1 and 2 of this article shall be performed in accordance with the legal rules and procedural provisions of the States Parties concerned or the provisions of any applicable bilateral or multilateral agreements regarding this matter.

Article 12
Proceeds or assets that have been seized

1. A State Party seizing assets set forth in article 10 of this Convention, upon the request of another State Party, shall return them to the State Party in whose territory the crime was committed from which the assets so seized were obtained.

2. In the event assets set forth in article 10, paragraph 1, of this Convention are seized, States Parties shall take the measures necessary to transfer those assets to the victims of the crime or to their legal owners or to the organs struggling against corruption in the State where the crime was committed from which the assets so seized were obtained.

Article 13
Extradition

1. In the event persons who have committed crimes covered by this Convention are in the territory of the State Party from which their extradition is requested, extradition shall be executed, provided that the crime for which the extradition request is made is a crime in both the requesting and the requested States Parties.

2. A crime for which this article is applied shall be deemed as a crime included in all kinds of extradition agreements existing between States Parties. States Parties shall include such extraditable crimes in agreements between themselves.

3. Extradition shall be executed in compliance with the legal rules of the requesting and requested States Parties.

4. In the event that a State Party making extradition conditional on the existence of an extradition agreement receives a request for return from a State Party with which it does not have an extradition agreement, it shall consider this

Convention sufficient legal basis for extradition concerning the crimes covered by this Convention.

5. Bound by its own domestic law and its own extradition agreements, in cases where the requesting State Party is satisfied that the situation is critical and urgent and when the requesting State Party so requests, the requested State Party shall take the appropriate measures, including surveillance, to ensure that the person whose extradition is requested and who is in its custody is present throughout the extradition procedure.

6. If the extradition requested for the implementation of penalties covered by this Convention is refused on the ground that the person whose extradition is required is the citizen of the requested State Party, to the extent allowed by the domestic law of the requested State Party, extradition shall be executed when the enforcement of the penalty given or the remainder of it, in accordance with the domestic law of the requesting State Party, can take place in the territory of the requested State Party, upon the application of the requesting State Party.

Article 14
Mutual legal assistance

1. States Parties shall provide all kinds of necessary legal assistance to one another during the investigation and prosecution of crimes covered by this Convention. Legal assistance concerning the same legal proceeding continuing in the territories of both States Parties shall be afforded based on the principle of mutuality.

2. Legal assistance shall cover the following under the scope of this Convention:

(a) Collecting evidence and taking statements from people;

(b) Effecting service of judicial documents;

(c) Taking the necessary research measures during investigation and prosecution and enforcing seizure;

(d) Examination of objects and sites;

(e) Exchange of expert reports;

(f) Exchange of the originals or certified copies of all kinds of documents;

(g) Exchange of all other kinds of information and documents, provided that this is in compliance with the law of the requested State Party.

3. Legal assistance shall be afforded in cases where the State Party, that is providing the information and documents believes that such shall be useful in an investigation or prosecution performed in another State Party, even if a request has not been made.

4. The requesting State Party shall not transfer those information and documents to third States Parties without the permission of the requested State Party.

5. The provisions of this article shall not affect the obligations arising from other bilateral or multilateral conventions concerning mutual legal assistance.

6. States Parties shall not prevent the implementation of this article on the ground of bank secrecy.

7. Requests made pursuant to this article shall not be fulfilled when the event forming the subject of the request is not a crime in both the requesting and requested State Party. The requested State Party may provide legal assistance in an event that is considered a crime by the requesting State Party, irrespective of whether this is a crime under its local law or not.

8. If persons that are in the territory of a State Party are requested for assistance during identification or testimony or for collecting evidence during the investigation or prosecution of a crime covered by this Convention and which has been committed in another State Party; such persons may be transferred, provided that the following conditions are fulfilled:

(a) If the person agrees to this of his or her own free will;

(b) If the authorized officials of both States Parties agree.

9. For the purposes of paragraph 8 of this article:

(a) The State Party to which the person is transferred shall have the authority and obligation to keep the transferred person in custody, unless otherwise requested or authorized by the State Party sending the person;

(b) The State Party to which the person is transferred shall return the person without delay on the date it has agreed on or will agree on with the State Party sending the person;

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

10. The person transferred cannot be in any way prosecuted, detained or punished or his personal freedom limited in any other way in situations stated in paragraphs 8 and 9 of this article without the consent of the State Party sending that person.

11. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for legal assistance, to transmit those requests or to execute them.

12. Requests shall be made in writing and in the language of the country the request is being made by. In emergencies, requests may be made orally, provided that it is confirmed in writing.

13. The following shall be included in the request:

(a) The name of the requesting authority;

(b) The main subject of the investigation and prosecution forming the subject of the request and the name of the authority performing the investigation or prosecution;

(c) A summary of the relevant facts, in requests other than for service of judicial documents;

(d) A description of the assistance requested and the procedure requested by the requesting State Party;

(e) Information such as the identification and address of the person in question;

(f) The aim of the request for information, document or action.

14. The requesting State Party may require that the requested State Party keep confidential the elements and main features of the request, except to the extent necessary to execute the request.

15. Mutual legal assistance may be refused when:

(a) The request has not been made in accordance with the provisions of this article;

(b) The requested State Party sees a possibility that the execution of the request may affect its own independence, security, public order or other vital interests;

(c) The requested State Party has forbidden the requested procedure by its domestic law, in the event a similar crime is subject to investigation, prosecution or judicial proceedings under its own jurisdiction;

(d) The execution of the request for mutual legal assistance would violate the legal system of the requested State Party.

16. In the event mutual legal assistance is refused, the reasons for refusal shall be given.

17. A requested State Party shall afford mutual legal assistance as soon as possible and if any possible time limit has been suggested, preferably in the request, for reasons stated by the requesting State Party, this request shall be taken into full consideration. The requested State Party shall respond to reasonable requests by the requesting State Party on progress in its handling of the request. The requesting State Party shall inform the requested State Party immediately in the event the requested assistance is no longer needed.

18. Mutual legal assistance may be postponed by the requested State Party on the ground that such assistance may interfere with an ongoing investigation, prosecution or judicial proceeding.

19. Without prejudice to the implementation of paragraph 10 of this article, a witness, expert or other person accepting to give evidence or to help with an investigation, prosecution or judicial proceeding in the territory of the requesting State Party, upon the request of that State Party, cannot be prosecuted, detained or punished or his or her personal freedom limited in any other way due to actions, omissions or convictions prior to leaving the territory of the requesting State Party. Such safe conduct shall end within fifteen days of the official notification that the presence of the witness, expert or other person is not required by the judicial authorities any more or at the end of any period decided on by the States Parties, if

the witness, expert or other person remains in the territory of the requesting State Party voluntarily or returns of his or her own free will after leaving.

20. The normal expenses of executing the request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If the execution of the request will require substantial or extraordinary expenditures, the States Parties shall consult to determine under which terms and conditions the request will executed and how the costs shall be borne.

21. The requested State Party:

(a) Shall provide to the requesting State Party the government records, documents or information that it has and that may be revealed to the public under its domestic law;

(b) Shall provide in whole or in part the government records, documents or information that it has and that may not be revealed to the public under its domestic law to the requesting State Party, at its own discretion.

22. States Parties shall consider the possibility of concluding bilateral or multilateral agreements or arrangements in order to give practical effect to the provisions of this article, to serve its purposes or to enhance its provisions, as necessary.

Article 15
Joint investigations

States Parties may conclude bilateral or multilateral agreements or arrangements regarding issues that are the subject of investigations, prosecutions or judicial proceedings carried out in one or more States; competent authorities may establish joint investigative organs. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreeing on each case separately. The States Parties involved shall ensure that full respect is paid to the sovereignty and independence of the State Party where such investigation is to be carried out.

Article 16
Special investigative techniques

1. If basic principles of its domestic law allow it, each State Party shall take the necessary measures to allow the appropriate use of electronic or other surveillance techniques and confidential operations in their territories and in suitable places by their own authorities for the purpose of effectively combating the crimes covered by this Convention, under the conditions prescribed by its domestic law.

2. States Parties are encouraged to conclude, when necessary, bilateral or multilateral agreements or arrangements for using such special investigative techniques at the international level within the framework of cooperation, to investigate crimes covered by this Convention. Such agreements and arrangements shall be concluded and implemented in full compliance with the principles of sovereign equality and independence of States and shall be carried out in strict compliance with the provisions of these agreements and arrangements.

3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level will be taken on a case-by-case basis and, when necessary, take into consideration the necessity to respect the jurisdiction of the State Party concerned and the financial implications.

Article 17
Protection of witnesses and those cooperating with law enforcement authorities

Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:

(a) Persons who report criminal offences established in accordance with article 5 of this Convention or otherwise cooperate with investigating or prosecuting authorities;

(b) Witnesses who give testimony concerning such offences.

Article 18
Transfer of criminal proceedings

For the prosecution of a crime covered by this Convention, States Parties shall consider the transfer of the proceeding from one State to the other for the concentration of the prosecution, especially in cases where more than one jurisdiction is involved, where they are of the opinion that proper administration of justice will benefit from such transfer.

Article 19
Establishment of criminal record

In a criminal investigation concerning a crime covered by this Convention, each State Party shall, in order to use the information whether or not the accused has a previous conviction in another State, adopt legislative or other measures that will enable such records to be taken into consideration, as appropriate.

Article 20
Law enforcement cooperation

1. States Parties shall cooperate closely with one another, in compliance with their domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the crimes covered by this Convention. Each State Party shall adopt effective measures, especially in the following matters:

(a) If the States Parties concerned find it appropriate, developing channels of communication between authorities, agencies and services to provide secure and rapid exchange of information, including links with other criminal activities, and to create them where necessary, regarding all aspects of the crimes covered by this Convention;

(b) To cooperate with all other States Parties regarding these matters in the investigation of the crimes covered by this Convention:

(i) The identification, whereabouts and activities of the persons suspected of such crimes and the location of other persons concerned;

(ii) The movement of proceeds and assets obtained from the commitment of such crimes;

(iii) The movement of the property, equipment or other instrumentalities used or intended for use in the commitment of the crimes or arising from the crimes;

(c) To provide efficient coordination between their authorities, agencies and services, and to encourage the exchange of personnel and other experts, including appointing of liaison officers, subject to bilateral agreements or arrangements between the States Parties concerned;

(d) To exchange information with other States Parties concerning specific means and methods, including false identification, use of forged, altered or false documents or other means of hiding the activities concerning the crimes covered by this Convention;

(e) To exchange information and coordinate administrative and other suitable measures taken for the early detection of crimes covered by this Convention.

2. In order to implement this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements concerning direct cooperation between their national law enforcement agencies and, where such agreements and arrangements already exist, further developing them. In the absence of such agreements and arrangements between the States Parties concerned, the Parties may consider this Convention sufficient basis for mutual law enforcement cooperation concerning crimes covered by this Convention. States Parties shall make full use of these agreements or arrangements, as necessary, to develop cooperation between their law enforcement agencies, including international or regional organizations.

3. States Parties shall cooperate in order to deal with corruption committed by the use of modern technology, within their own possibilities.

Article 21
Training and technical assistance

1. Each State Party shall start, develop and improve specific training programmes for its own law enforcement personnel, including prosecutors, investigating magistrates, financial inspectors and customs personnel and the personnel assigned to the control, determination and prevention of crimes covered by this Convention, as necessary. Such programmes may include secondment and exchange of personnel. Such programmes shall be, especially and to the extent allowed by domestic law, oriented towards:

(a) Methods used in the control, detection and prevention of crimes covered by this Convention;

(b) Routes, including transit States, and techniques used by individuals suspected of involvement in crimes covered by this Convention and suitable countermeasures;

(c) The identification and tracing of property or proceeds of crime and the movement of those property, proceeds, equipment or other instruments arising from

crime; the identification and monitoring of the methods used for their transfer, their hiding or changing of form, and the methods for the struggle against money-laundering and other financial crimes;

(d) Collection of evidence;

(e) Control techniques in free trade zones and free ports;

(f) Modern law enforcement equipment and techniques, including electronic surveillance, controlled delivery and undercover operations;

(g) Methods used in the struggle against international corruption crimes committed through the use of computers, communication networks and other modern technologies;

(h) Methods used in the protection of victims and witnesses.

2. States Parties shall help each other in the planning and implementation of research and training programmes designed to share expertise in the areas referred to in paragraph 1 of this article and, in order to achieve this aim, shall use regional and international conferences and seminars in order to have discussions regarding mutual problems, including the special problems of transit States, and encourage cooperation, whenever appropriate.

3. States Parties shall encourage training and technical assistance that will affect extradition and mutual legal assistance. Such training and technical assistance may include language training, secondments and exchanges between personnel in central authorities and agencies that have related duties.

4. Where bilateral and multilateral agreements and arrangements exist, States Parties shall, to the extent necessary, strengthen their efforts to maximize operational and training activities, within international and regional organizations and within other bilateral and multilateral agreements and arrangements.

Article 22
Financial assistance

Each State Party shall search for possibilities to share the revenues it has obtained from its struggle against the crimes covered by this Convention with other States Parties whose interests have been damaged by such crimes. Moreover, developed countries shall provide the necessary support to the development efforts of the developing countries and provide the required tools for effective struggle against international corruption.

Article 23
Prevention

1. States Parties shall develop and encourage best practices and policies aiming at preventing corruption and to develop and improve national projects in this regard.

2. In compliance with basic principles of their domestic law, States Parties shall seek to reduce current or future opportunities, by means of appropriate legislative, administrative or other measures, for organized criminal groups to enter

into legal markets with proceeds of crime. Such preventive measures should focus on:

(a) Strengthening cooperation between private institutions, including industry and law enforcement agencies or prosecutors;

(b) Developing standard procedures designed to protect the integrity of public and relevant private institutions, developing codes of conduct for relevant professions, especially lawyers, notaries, financial advisors, auditors and administrators of press and media organizations;

(c) Prevention of the misuse of tender procedures applied by public authorities, and the licences and incentives granted by public authorities for commercial activities by organized criminal groups;

(d) The prevention of the misuse of legal persons; these measures may include the following:

(i) The creation of public records on legal and natural persons who have taken part in the formation, administration and financing of legal persons;

(ii) The creation of the possibility of preventing persons convicted of crimes covered by this Convention from acting as administrators in companies of other legal persons for a reasonable period of time by a court order or any other suitable procedure;

(iii) The creation of public records of individuals who have been banned from acting as directors of legal persons; and

(iv) The exchange of information contained in the records referred to in subparagraphs (d), (i) and (ii) of this paragraph.

3. States Parties shall periodically re-evaluate the existing relevant legal instruments and administrative practices in order to determine any vulnerabilities that may be abused by organized criminal groups.

4. States Parties shall increase public awareness regarding the existence of and reasons for international corruption and the threat this crime poses. The information will be spread via the mass media where appropriate and shall include measures designed to encourage public participation in the prevention of and the struggle against such crimes.

5. States Parties shall coordinate among themselves and with the relevant international and regional organizations in the development and encouragement of measures referred to in this article, as appropriate.

Article 24
Review of the implementation of the Convention

States Parties shall establish an organ authorized for the required supervision and review of the effective implementation of this Convention. [*The implementation of this article must be specially determined taking into consideration other international conventions, especially the United Nations Convention against Transnational Organized Crime.*]

Note. Additional articles on other matters concerning the implementation of the Convention, the resolution of disputes, signature, ratification, acceptance, approval, implementation, effectiveness, amendment, withdrawal, depositary and languages will be drafted taking into consideration the relevant articles of other international conventions.

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Proposals and contributions received from Governments

Pakistan: proposed amendments to the United Nations Convention against Corruption*

Synopsis

1. Off-shore jurisdiction and "insulation" should end and the Convention must extend to all territories under the control of the States parties.

2. Retention of the proceeds of corruption should be treated as a stand-alone and independent offence.

3. The requirement of definitely proving *mens rea* should be dispensed with while defining corruption, since it is extremely difficult to do so.

4. A central authority should be nominated by each State to entertain and process requests for seizure, confiscation, mutual cooperation and so on.

5. States should be empowered to declare transactions resulting from corruption voidable.

Specific proposals

Article 2: Use of terms

6. The term "public office holder" should also be defined so as to include public office holders within the purview of the Convention.

* The amendments proposed by Pakistan are to the consolidated draft text of the United Nations Convention against Corruption produced by the Informal Preparatory Meeting in Buenos Aires (see A/AC.261/3).

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Article 9: Procurement[1]

Paragraph 1

7. Pakistan proposes the following text:

"Procurements in the public sector shall be made in a transparent, fair, open and standardized manner."

Paragraph 2

8. Pakistan proposes the following text:

"States Parties shall endeavour to adopt the necessary legislative measures to introduce uniform legislation, rules and manuals for all the procurement agencies in their respective jurisdictions and those regulations shall be prepared with due regard to recognized international texts in the area."

Article 11: Accounting

Paragraph 11 (a)

9. Pakistan proposes the following text:

"The application of this article shall be restricted to legal persons, excluding natural persons, unless so specifically legislated by the State Party to this Convention."[2]

Paragraph 11 (b)

10. Pakistan proposes the following text:

"Each State Party shall endeavour to take effective measures to ensure that there is satisfactory monitoring of abnormal banking transactions and, in appropriate cases, the monitoring department may require proof to satisfy itself with regard to the legitimacy of the origin of the money."[3]

Article 13

Paragraph 1

11. Pakistan proposes the following text:

"Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and such intention may reasonably be deduced from the circumstances:"[4]

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[1] Procurement has not been addressed at all. The proposed language is in line with the spirit of the convention. The existing model law of the United Nations Commission on International Trade Law can be adopted.

[2] An effort has been made to emphasize the significance of corruption in the private-public relationship.

[3] This is a basic obligation.

[4] It is intended that the requirement of *mens rea* be dispensed with by diluting the words "or appears to have been done intentionally". In fact the word "intentionally" should be deleted, since the offence of corruption should be treated as a crime of "strict liability". It should also be

Article 14

Paragraph 1

12. Pakistan proposes the following text:

"Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of business activity and such intention may reasonably be deduced from the circumstances:"

Proposed new article[5]

13. Pakistan proposes the following text:

"*Criminalization of hiding the proceeds of corruption*

"Each State Party shall adopt such legislative and other measures as may be necessary to establish the following as criminal offences:

"(a) Purchasing immovable property from the proceeds of corruption and continuing[6] to retain it under any name;

"(b) Maintaining bank accounts, investments and any other form of property that attempts to hide the proceeds of corruption and continuing to retain it under any name.

viewed as a crime of special peculiarities in which proving "intent" of corruption is close to impossible. The elements of the crime itself means *mens rea*. For example, if any abnormal payment is received in the account of a public servant from an agent of a company that has been awarded a contract by the said public servant, then should those facts not be enough to establish that corruption has occurred? Why make the effort to look for an elusive and vague concept of "intention" that may be increasingly difficult to establish"?

In Pakistani experience, it is seen that the National Accountability Bureau has complete access to records and documents but still has failed to prove criminal intent or *mens rea*, so how is it possible for the said intent to be ascertained from the record and persons scattered in several States?

That is why the Bureau's Ordinance several offences do not require the proof of criminal intent. Even in international law offences of genocide under the Rome Statute of the International Criminal Court (A/CONF.183/9) do not require proof of *mens rea*. The fact of the commission of the crime and its imputability with the person is sufficient to establish criminal liability.

[5] This is a new provision to be inserted after article 14. Articles 13 and 14 are the soul of the convention since they define or lay down the contours of offence of corruption. The hiding of proceeds of crime is a stand-alone offence. It is most appropriate if it is placed after article 14. The formulation is quiet similar to articles 13 and 14.

[6] Continuation of retention of the proceeds of crime is very necessary and must not be allowed to be deleted. The word "continuing", makes the offence of retention of ill-gotten wealth a continuing offence and is not defeated by the argument of retrospectivity.

Article 15: Criminalization of laundering of proceeds of corrupt practices

Paragraph 1

14. Pakistan proposes the following text:

"Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and such intention may reasonably be deduced from the circumstances:"[7]

Proposed new article[8]

15. Pakistan proposes the following text:

"*Treatment of the consequences of corruption*

"1. Each State Party, in accordance with its domestic law, may opt to cancel, rescind, recall or set aside any contract, arrangement or benefit awarded or given in direct consequence of an act of corruption.

"2. Nothing in this article shall prevent any private party from pressing claims against natural or legal persons who are found to have committed acts of corruption."

Article 20: Cooperation with and between national authorities

Paragraph 8 (a)

16. Pakistan proposes the following text:

"A central authority be nominated by each State Party to entertain and process requests for seizure, confiscation and so on to promote mutual cooperation."

[7] The concept of intention should ideally be deleted for the reasons given above. However, if it is not removed after negotiation, then the above text is proposed to dilute the effect of requiring *mens rea* to establish the crime of corruption.

[8] This new provision provides for the consequences of corruption and gives the option to the State to declare void any contract that has resulted from corruption. It also protects private parties. It empowers the State to exercise jurisdiction and to cancel the benefit, contract and so on received on account of corruption. Such a clause is absolutely necessary because, on the one hand, the confiscation of proceeds of corruption is ordered in the convention and it will leave a considerable anomaly if the consequences of corruption are allowed to continue. Therefore, it is absolutely necessary that State be empowered under the convention to exercise the option either to allow the contract to continue or to cancel the same. For example, in the case of the independent power producer contracts, even if the offenders are to be punished, what difference would it make to the people if contracts that inflict a terrible burden on them are allowed to continue? Therefore, once it is found that corruption has been committed, the actions resulting from the act of corruption should be, at the option of the host State, struck down.

Article 25

17. The following new paragraph may be added:

> "7. The Convention shall extend to all the territories of the State Party, whether controlled directly or indirectly, and the State Party shall make the necessary legislative changes to ensure that all protection or financial immunity in the nature of off-shore operations and so on are withdrawn for the purposes of this Convention."[9]

[9] This formulation demolishes the defence of off-shore protection and other financial "insulations". In order to make the convention an effective instrument, it is necessary for all off-shore or special banking jurisdictions to be brought within the scope of the convention.

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Philippines: position paper

1. The draft Philippine position paper on the United Nations Convention against Corruption adopts as official reference and as establishing the parameters for negotiation applicable Philippine laws and similar instruments related to graft and corruption.

2. The paper refers to relevant United Nations conventions ratified by the Government of the Philippines, as well as to documents of organizations of sovereign States, in determining the points for negotiation at the Informal Preparatory Meeting in Buenos Aires in December 2001.

3. All articles included in the draft Philippine position paper are recommended as priority areas for the Informal Preparatory Meeting in Buenos Aires in December 2001.

4. The following draft articles are proposed:

"Article 2
"Use of terms

"For the purposes of this Convention:

"(a) 'Corruption' shall mean the promising, requesting, offering, giving or accepting, directly or indirectly, of an undue advantage or prospect thereof that distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or prospect thereof. It shall also be understood as defined in the domestic law of the State where the criminal act or omission is cited, without prejudice to provisions requiring signatory States to adopt necessary legislative or other measures to establish as criminal offences covered by this Convention certain acts of corruption:

"(i) The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any

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article of monetary value or other benefit in exchange for any act or omission in the performance of his or her public functions;

"(ii) The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value or other benefit in exchange for any act or omission in the performance of his or her public functions;

"(iii) Any act or omission in the discharge of his or her duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or herself or for a third party;

"(iv) The fraudulent use or concealment of property derived from any of the acts referred to in this article; and

"(v) Participation as a principal, co-principal, instigator, accomplice or accessory after the fact or in any other manner in the commission or attempted commission of or in any collaboration or conspiracy to commit any of the above acts;

"(b) 'Plunder' means the systematic or methodical illicit enrichment of a public official of unlawful financial proceeds obtained through a series or combination of corrupt acts as defined in this Convention;

"(c) 'Public official' shall be understood by reference to the definition of 'official', 'public officer', 'mayor', 'minister' or 'judge' in the domestic law of the State in which the person in question performs the function and as applied in its criminal law;

"(d) 'Judge' referred to in subparagraph (c) above shall include prosecutors and holders of judicial offices; in the case of proceedings involving a public official of another State, the prosecuting State may apply the definition of public official only insofar as that definition is compatible with its domestic law;

"(e) 'Legal person' shall mean any entity having such status under the applicable domestic law, except for States or other public bodies in the exercise of state authority and for public international organizations;

"(f) 'Conflict of interest' occurs when a public official is a member of a board of such business or corporation, an officer or a substantial stock holder of private corporation or owner or has substantial interest in a business and the interest of such business or corporation or his or her rights or duties therein are opposed to or affected by the faithful performance of official duty.

"(g) 'Divestment' means the transfer of title or disposal of interest in property by voluntarily, completely and actually depriving or dispossessing himself or herself of his or her right or title to it in favour of a person or persons other than his or her spouse and relatives;

"(h) 'Property' shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets;

"(i) 'Proceeds of crime' shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

"(j) 'Freezing' or 'seizure' shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

"(k) 'Confiscation', which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority.

"Article 3
"Scope of application

"This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with relevant articles of this Convention.

"Article 4
"Protection of sovereignty

"1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

"2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

"Article 5
"Corrupt practices

"1. Criminal acts

"1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

"(a) A public official demanding or accepting, either directly or indirectly, any object of pecuniary value such as a gift, promise or an undue advantage of any nature, whether for himself or herself or for another person, in exchange for an act or an omission in the discharge of his or her duties;

"(b) Offering or giving a public servant, either directly or indirectly, any object of pecuniary value such as a gift, favour or an advantage, whether for himself or herself or for another person, in exchange for an act or an omission in the discharge of his or her duties;

"(c) A public servant soliciting or receiving, either directly or indirectly, any undue advantage for himself or herself or another person in order to carry out or refuse to carry out an act in the exercise of his or her functions;

"(d) Promising, offering or giving, either directly or indirectly, any undue advantage to officials or workers in a private sector enterprise, either for themselves or for a third party, in order to induce them to carry out or to refuse to carry out an act in violation of their oath of office;

"(e) Directly or indirectly offering, giving or promising any undue advantage to any person who declares or confirms that he or she can exercise some influence on decisions or actions of persons occupying positions in the public or private sector whether the undue advantage is for himself or herself or for another person; also soliciting or receiving an offer or a promise in exchange for the influence;

"(f) Systematic or methodical illicit enrichment of a public official of unlawful financial proceeds obtained through a series or combination of corrupt acts as defined in this Convention, penalties for which may vary according to the gravity of the offence, and as may be determined by the participating States;

"(g) Failure of a public officer to explain acquisition during his or her incumbency of an amount of property that is manifestly out of proportion to his or her salary as a public official and other lawful sources of income. In which case, said property shall be presumed to have been unlawfully acquired.

"*2. Other prohibited acts*

"2. A corrupt act subject to sanctions provided for in the domestic law of each State:

"(a) Disclosure: failure of a public official either wilfully or through gross negligence to disclose accurately on an annual basis his or her assets, liabilities and net worth in order to defraud the Government of obligations such as taxes and/or deceive the proper authorities of his or her unlawful activities and proceeds;

"(b) Divestment: failure of a public official to divest applicable assets to avoid conflicts of interest to a person or persons other than his or her spouse or relatives within the fourth civil degree of consanguinity or affinity.

"*Article 7*

"*Liability of persons*

"1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes such as plunder and for the other offences established in accordance with pertinent articles of this Convention.

"2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

"3. Such liability shall be without prejudice to the criminal liability of the natural or juridical persons who have committed the offences.

"4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions.

"5. Each State Party shall take the necessary measures to allow heads and other responsible officials of businesses who have knowledge of or consented to the crime or any persons having power to take decisions or exercise control within a business to be declared criminally liable in accordance with the principles defined by its national law in cases of fraud.

"*Article 8*
"*Compensation for damage*

"1. Each State Party shall provide in its domestic law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage.

"2. Such compensation may cover material damage, loss of profits and non-pecuniary loss.

"3. Each State Party shall, consistent with its domestic law, provide for compensation for damages committed under the following conditions:

"(a) The defendant has committed or authorized the act of corruption, or failed to take reasonable steps to prevent the act of corruption;

"(b) The plaintiff has suffered damage; and

"(c) There is a causal link between the act of corruption and the damage.

"4. Each State Party shall provide in its domestic law that, if several defendants are liable for damage for the same corrupt activity, they shall be jointly and severally liable.

"5. Each State Party shall provide in its domestic law for appropriate procedures for persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the State or, in the case of a non-State party, from that party's appropriate authorities.

"6. Each State Party shall provide in its domestic law for the compensation to be reduced or disallowed, having regard to all circumstances, if the plaintiff has by his or her own fault contributed to the damage or its aggravation.

"7. Each State Party shall provide in its domestic law for proceedings for the recovery of damage to be subject to a limitation of not less than three years from the day the person who has suffered damage became aware or should reasonably have been aware that damage has occurred or that an act of corruption has taken place and of the identity of the person responsible. However, such proceedings shall not be commenced after the end of a limitation period of not less than ten years from the date of the act of corruption.

"8. The laws of the States Parties concerned regulating suspension or interruption of limitation periods shall, if appropriate, apply to the limitation periods prescribed in this article.

"*Article 10*

"*Prosecution, adjudication and sanctions*

"1. In addition to the measures set forth in article 5 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.

"2. Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions.

"3. Each State Party shall make the commission of an offence established in accordance with articles 2 and 5 of this Convention liable to sanctions that take into account the gravity of that offence.

"4. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

"5. In the case of offences established in accordance with article 5 of this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

"6. Each State Party shall ensure that its courts or other competent authorities bear in mind the grave nature of the offences covered by this Convention when considering the eventuality of early release or parole of persons convicted of such offences.

"7. Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence covered by this Convention and a longer period where the alleged offender has evaded the administration of justice.

"8. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.

"*Article 11*

"*Confiscation and seizure*

"1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

"(a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;

"(b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.

"2. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

"3. If proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

"4. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

"5. Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

"6. For the purposes of this article, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. States Parties shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

"7. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.

"8. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.

"9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

"*Article 15*
"*Extradition*

"1. The criminal offences established in accordance with this Convention shall be deemed to be included as extraditable offences in any extradition treaty existing between or among States Parties. States Parties shall undertake measures to include such offences as extraditable offences in any extradition treaty to be concluded between or among them.

"2. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it does not have an extradition treaty, it may consider this Convention the legal basis for extradition with respect to any criminal offence established in accordance with this Convention.

"3. States Parties that make extradition conditional on the existence of a treaty shall:

"(a) At the time of deposit of their instrument of ratification, acceptance, approval of or accession to this Convention, inform the Secretary-General of the United Nations whether they will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

"(b) If they do not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

"4. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

"5. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

"6. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

"7. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

"8. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

"9. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition

that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 8 of this article.

"10. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider the enforcement of the sentence that has been imposed under the domestic law of the requesting Party or the remainder thereof.

"11. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

"12. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of those reasons.

"13. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

"14. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

"15. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

"16. If the corrupt act for which extradition is requested is punishable by death under the law of the requesting State party and if in respect of such crime the death penalty is not provided for by law of the requested State Party or is not normally carried out, extradition may be refused unless the requesting State Party gives such assurance as the requested State Party considers sufficient that the death penalty will not be carried out.

"17. If extradition for a criminal offence established in accordance with this Convention is refused solely on the basis of the nationality of the person sought or because the requested State Party deems that it has jurisdiction over the offence, the requested State Party shall submit the case to its competent authorities for prosecution unless otherwise agreed with the requesting State Party and shall report the final outcome to the requesting State Party in due course.

"*Article 18*

"*Joint investigations*

"States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

"*Article 23*

"*Protection of witnesses*

"1. Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation of witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.

"2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

"(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

"(b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.

"3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

"4. The provisions of this article shall also apply to victims insofar as they are witnesses.

"*1. Assistance to and protection of victims*

"5. Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.

"6. Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.

"7. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of

criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

"2. *Measures to enhance cooperation with law enforcement authorities*

"8. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.

"9. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.

"10. Protection of such persons shall be as provided for in paragraphs 1 to 4 of this article.

"*Article 26*

"*Law enforcement cooperation*

"1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. Each State Party shall, in particular, adopt effective measures:

"(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention;

"(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

"(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

"(ii) The movement of proceeds of crime or property derived from the commission of such offences;

"(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

"(c) To provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes;

"(d) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

"(e) To exchange information with other States Parties on specific means and methods used to engage in corrupt practices, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing such activities;

"(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

"2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the Parties may consider this Convention the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

"3. States Parties shall endeavour to cooperate within their means to respond to corrupt practices committed through the use of modern technology.

"Article 27

"Collection, exchange and analysis of information on the nature of corruption

"1. Each State Party shall consider analysing, in consultation with the scientific and academic communities, trends in corruption in its territory, the circumstances in which corruption occurs, as well as the professional groups and technologies involved.

"2. States Parties shall consider developing and sharing analytical expertise concerning corrupt practices with each other through international and regional organizations. For that purpose, common definitions, standards and methodologies should be developed and applied as appropriate.

"3. Each State Party shall consider monitoring its policies and actual measures to combat corrupt practices and making assessments of their effectiveness and efficiency.

"Article 28

"Training and technical assistance

"1. Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the offences covered by this Convention. Such programmes may include secondments and exchanges of staff. Such programmes shall deal, in particular and to the extent permitted by domestic law, with the following:

"(a) Methods used in the prevention, detection and control of the offences covered by this Convention;

"(b) Routes and techniques used by persons suspected of involvement in offences covered by this Convention, including in transit States, and appropriate countermeasures;

"(c) Monitoring of the movement of contraband;

"(d) Detection and monitoring of the movement of proceeds of crime, property, equipment or other instrumentalities and methods used for the transfer, concealment or disguise of such proceeds, property, equipment, or other instrumentalities, as well as methods used in combating money-laundering and other financial crimes;

"(e) Collection of evidence;

"(f) Control techniques in free trade zones and free ports;

"(g) Modern law enforcement equipment and techniques, including electronic surveillance, controlled deliveries and undercover operations;

"(h) Methods used in combating corrupt practices engaged in the use of computers, telecommunications networks or other forms of modern technology; and

"(i) Methods used in the protection of victims and witnesses.

"2. States Parties shall assist one another in planning and implementing research and training programmes designed to share expertise in the areas referred to in paragraph 1 of this article and to that end shall also, when appropriate, use regional and international conferences and seminars to promote cooperation and to stimulate discussion on problems of mutual concern, including the special problems and needs of transit States.

"3. States Parties shall promote training and technical assistance that will facilitate extradition and mutual legal assistance. Such training and technical assistance may include language training, secondments and exchanges between personnel in central authorities or agencies with relevant responsibilities.

"4. In the case of existing bilateral and multilateral agreements or arrangements, States Parties shall strengthen, to the extent necessary, efforts to maximize operational and training activities within international and regional organizations and within other relevant bilateral and multilateral agreements or arrangements.

"*Article 29*

"*Other measures: implementation of the Convention*

"1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

"(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

"(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

"(b) Subject to the basic concepts of its legal system:

"(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

"(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

"2. For purposes of implementing or applying paragraph 1 of this article:

"(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

"(b) Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in accordance with article 5 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with corrupt practices;

"(c) For the purposes of subparagraph (b), predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of the State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

"(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

"(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence;

"(f) Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

"*Article 30*

"*Prevention of corruption*

"1. States Parties shall endeavour to establish in their domestic law a code of conduct and ethical standards for public officials and provide penalties for violations thereof. The code should require public disclosure of assets, liabilities and net worth, financial and business interests and shall commit the State to a policy of full public disclosure of all its transactions involving public interest. The State shall be allowed to verify abnormal financial transactions reported to have been undertaken by any public official or private person. The code shall also establish a system of incentives and rewards for

exemplary service and conduct based upon the observance of the norms of conduct laid down in the code.

"2. States Parties shall also endeavour to establish in their domestic law mandatory divestment requirements on the part of a public official when a conflict of interest arises.

"3. States Parties should provide mechanisms for the widest possible participation of civil society in the fight against corruption. Among such measures are the creation of community-based corruption prevention units or junior graft watch units to service as accredited private monitors. States Parties shall also provide in their domestic law for the utilization and deputization by anti-corruption agencies of any government prosecutor or private lawyer to act as special investigator or prosecutor to assist in the investigation of certain cases. Those designated and deputized to assist him or her as herein provided shall be under his or her supervision and control. In cases where a State Party's lead anti-corruption agency receives information sufficient to constitute grounds to investigate whether certain high officials of the country such as the President or the Vice-President may have violated any criminal law under its jurisdiction and where the head of that agency determines that any investigation or prosecution by him or her may result in a personal, financial or political conflict of interest, he or she shall be required to appoint an independent counsel.

"*Article 34*

"*Relations with other treaties and protocols*

"1. The present Convention repeals all preceding provisions relating to acts of corruption in all bilateral treaties existing between two States Parties.

"2. This Convention may be supplemented by one or more protocols.

"3. In order to become a party to a protocol, a State or a regional economic integration organization must also be a Party to this Convention.

"4. A State Party to this Convention is not bound by a protocol unless it becomes a Party to the protocol in accordance with the provisions thereof.

"5. Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol.

"*Article 38*

"*Implementation of the Convention*

"1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

"2. The States Parties present during the Conference provided for in article 36 shall designate the competent body to conduct monitoring activities on the implementation of this Convention by States Parties."

Notes on specific articles

5. The following annotations may be used as a guide for the informal talks, providing the context of the discussion by the Philippine Technical Working Group per article and indicating the priorities for negotiation recommended by the Philippine delegation.

Article 2: Use of terms

6. The Philippine Technical Working Group resolved to adopt a two-pronged approach to article 2: a standard, indicative definition of "corruption" as defined in international conventions and/or treaties and characterizations or acts of "corruption" that may be covered by the proposed Convention. Article 2 of the Philippine position paper seeks to include in article 2 the term "plunder", the inclusion of which is recommended as a priority for negotiation.

Article 3: Scope of application

7. The Philippine Technical Working Group arrived at a consensus that, for the purposes of this convention, only officials holding public office are covered by the convention, without prejudice however to the involvement and/or participation of the private sector and civil society in the prevention and/or prosecution of corrupt practices as referred to in articles 2 and 5. Participation in the crime of corruption by private individuals is recognized in article 2, subparagraph (a) (i)-(v), however. For purposes of the Informal Preparatory Meeting, corruption involving the private sector and civil society shall be recommended for future discussion. However, this stance will depend on how other countries would lobby for its inclusion in the proposed convention. The Philippine Technical Working Group recommends the explicit recognition of corruption in the private sector and civil society in the preamble or statement of principles of the proposed convention.

Article 4: Protection of sovereignty

8. The Philippine Technical Working Group recommends the inclusion of "ill-gotten wealth" in the preamble or statement of principles of the proposed convention as follows:

> "While the full implementation of all the provisions of this Convention in the respective jurisdictions of all States Parties concerned is highly ideal, it will not serve as a precondition for the return of ill-gotten funds from corruption to the country of origin."

This proposal arises from the need to recognize that ill-gotten wealth constitutes part of the patrimony of a country or nation. The inclusion of this principle is recommended, as a priority for negotiation, for inclusion in the preamble or statement of principles of the proposed convention or in relevant provisions.

Article 5: Corrupt practices

9. The Philippine Technical Working Group seeks for the recognition of corrupt practices as criminal and/or prohibited acts. Such categorization acknowledges that certain acts and punishment or sanctions therefor may vary according to the nature, gravity and extent of the damage resulting from corrupt practices. Hence, some

corrupt practices may rightly be recognized as "criminal acts" and others as "prohibited acts". Under "criminal acts", two elements are further recommended for negotiation: "plunder" (subparagraph (f)) and "unexplained wealth" (subparagraph (g)). Unlike the definition of "plunder" in article 2, article 5 carries qualifications as to the amount (Philippine laws consider "plunder" to involve amounts of 1 million United States dollars) and penalties therefor, as may be determined by participating States. For the convention, no standardized amount is being contemplated or proposed herein since the amount and penalties therefor vary in developed and developing countries and these need to be determined and to be consistent with the domestic law of the sovereign States. The same principle applies for corrupt practices categorized as "prohibited acts".

Article 7: Liability of persons

10. The Philippine Technical Working Group recommends the recognition of the liability of heads and officials of businesses who have knowledge of or consented to the commission of crimes to be declared criminally liable. While similar provisions exist in documents of organizations of sovereign States, the Philippine position seeks to expand its scope to include officials, other than the heads of businesses under article 7. Clarification may be sought, however, as to which businesses are covered by this convention, although article 3 refers to "public officials" as defined in article 2. For purposes of negotiating article 7, "heads and other officials" would refer to government financial institutions, government-owned and controlled corporations, and businesses in which the Government is represented on the board, as in the case of the Philippines. Paragraph 3 includes "juridical persons" in criminal liability for offences committed.

Article 8: Compensation for damage

11. The Philippine Technical Working Group requests cognizance of the fact that sovereign States could not and should not be sued for damages arising from or as a result of the commission of corruption by public officials. This proceeds from the acknowledgement that the proceeds of corruption constitute part of the state patrimony and must be rightfully restored to it. Further awards as a result of claims for damages are monies from public coffers (i.e. taxes). It would not be just and fair for the taxpayers of any State to pay twice for crimes committed by public officials. From a more practical viewpoint, it would be opening the floodgates for the convention to recognize obligations to pay for damages on the part of sovereign States for acts of corruption by public officials. It is recommended therefore that compensation for damages should only be made by persons who have committed such crimes.

12. The Philippine Technical Working Group further recommends a discussion by the Philippine delegation, as regards cases of illicit funds that are private in nature, of whether the courts should be able to order forfeiture of such funds and proceeds of the crime and of compensation for damages in favour of rightful claimants.

Article 10: Prosecution, adjudication and sanctions

13. The proposed text of article 10 is a modified version of articles 9 and 11 of the United Nations Convention on Transnational Crime (the "Organized Crime Convention").

Article 11: Confiscation and seizure

14. The proposed text of article 11 is a modified version of articles 12-14 of the Organized Crime Convention, taking into account Republic Acts No. 1379 and 9160 of the Philippines.

Article 15: Extradition

15. The Philippine Technical Working Group requests that special attention be accorded paragraph 16 on corrupt acts punishable by the death penalty, as formulated.

Article 17: Mutual legal assistance

16. The Philippine Technical Working Group recommends that article on mutual legal assistance be deferred for further study. Points for negotiation may be recommended in formal talks for the convention. For purposes of the informal talks in Buenos Aires, however, article 18 of the Organized Crime Convention may be used as official reference for the Philippine delegation.

Article 18: Joint investigations

17. The Philippine Technical Working Group recommends the inclusion of a provision in appropriate paragraphs under article 18 to read: "States Parties should volunteer information, subject to domestic law, on a case-to-case basis".

Article 26: Law enforcement cooperation

18. The proposed text of article 26 is a modified version of articles 24 and 25 of the Organized Crime Convention.

Article 27: Collection, exchange and analysis of information on the nature of corruption

19. The proposed text of article 27 is a modified version of article 28 of the Organized Crime Convention.

Article 28: Training and technical assistance

20. The proposed text of article 28 is a modified version of articles 29 and 30 of the Organized Crime Convention.

Article 29: Other measures: implementation of the Convention

21. The proposed text of article 29 is a modified version of articles 29 and 30 of the Organized Crime Convention.

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Chile: proposed terms of reference for the work of the Ad Hoc Committee

1. The aim of Chile's proposal on the work of the Ad Hoc Committee for the Negotiation of a Convention against Corruption is to achieve the central objective of drafting an international legal instrument against corruption. Chile therefore considers that it is necessary and appropriate that the work of the Ad Hoc Committee be based on the realization that that challenge will involve a complex and lengthy process of agreements and decision-making, which should be conducted with due regard for at least the three criteria below.

I. Effectiveness

2. This criterion involves the objective of drafting an effective United Nations international instrument against corruption. The achievement of that objective must be guaranteed to the greatest extent possible.

3. One way of guaranteeing the achievement of the objective in a systematic manner is to adopt a procedure that facilitates agreement through the process of collective decision-making.

4. Not all procedures facilitate that task and Chile therefore proposes a simple form of dividing the work into discussion levels. In that way, all the topics (preamble, preventive measures, sanctions and so on) can be assigned to different levels, according to the likelihood of fundamental agreements being reached on them. What will vary at each level is the degree of discussion and development that they will require.

5. Thus, the work can be divided into three discussion levels:

(a) A first level of discussion dealing with topics and concepts;

(b) A second discussion level that will focus on specific contents;

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(c) A third discussion level that will consider specific innovative contents and areas on which there is considerable disagreement.

6. Discussion could be conducted at these three levels within the Committee's time frame (2002-2003), giving priority to the discussion of topics at the first and second levels, but leaving a reasonable amount of time for consideration of third-level topics.

II. Full coverage

7. Since the terms of reference for the negotiation of the United Nations Convention against Corruption involve the drafting of a broad international instrument, the application of the terms of reference will entail the discussion of the widest possible range of topics, even if not all of them are included in the final version of the Convention. Thus, the three discussion levels should consider the various general topics so as to ensure the progressive and horizontal development of the provisions as the discussion proceeds from level to level. In this way, the list of topics included in paragraph 3 of the draft resolution of the Economic and Social Council, entitled "Terms of reference for the negotiation of the United Nations convention against corruption" (see A/AC.260/2 and Corr.1, para. 5), could be restructured as shown below in order to facilitate their discussion in the Ad Hoc Committee.

First level: topics and concepts

8. With respect to topics, the first level would cover both the form and substance of the basic elements of a convention of this type. In this proposal, the basic elements have been drawn from the proposals put forward by Argentina, Bolivia, Colombia, Mexico, Peru and Venezuela, as well as those of Austria and the Netherlands and Austria and the United Kingdom of Great Britain and Northern Ireland, and could be the following:

1. Preamble.
2. General concepts for the application of the Convention.
3. Prevention.
4. Criminalization and sanctions.
5. International cooperation and technical assistance.
6. Follow-up mechanism.

9. With respect to concepts, this level would cover the topics included in the basic elements, and would call for efforts to achieve the greatest possible degree of order and coherence. This is a preliminary step towards reaching agreement for the specific and detailed discussion of the second-level contents.

10. The topics for discussion and agreement could be treated in the following order:

1. Preamble:

   General background and purposes.

2. General concepts for the application of the Convention:

   (a) Definitions;

   (b) Principles for application.

3. Prevention:

   (a) Preventive measures relating to transparency in public management;

   (b) Preventive measures relating to the involvement of the public;

   (c) Preventive measures relating to the private financial system;

   (d) Preventive measures relating to the strengthening of state management and organization;

   (e) Preventive measures relating to transparency in the financing of political activities.

4. Criminalization and sanctions:

   (a) Establishment of offences relating to bribery;

   (b) Establishment of offences relating to conflicts of interest and trading in influence;

   (c) Establishment of offences relating to illicit enrichment;

   (d) Establishment of offences relating to the improper use of information;

   (e) Establishment of offences relating to the laundering of proceeds of crime;

   (f) Other offences.

5. International cooperation and technical assistance:

   (a) Commitments for judicial, law enforcement, administrative and financial cooperation;

   (b) International technical assistance mechanisms.

6. Follow-up mechanism:

   (a) Principles of the mechanism;

   (b) Organization;

   (c) Operation;

   (d) Financing;

   (e) Management of information.

11. Agreement on the first-level topics will make it possible to proceed quickly to the second-level topics.

Second level: specific contents

12. The second-level topics are the specific contents of each of the six topics listed above, which could be established by giving priority to definitions of offences and specific contents found in other widely applied or authoritative international instruments.

13. In that regard, Chile would like to stress the importance attached in the terms of reference to the report of the Secretary-General on existing international legal instruments, recommendations and other documents addressing corruption (E/CN.15/2001/3 and Corr.1), as well as the relevant parts of the report of the Commission on Crime Prevention and Criminal Justice on its tenth session.[1]

14. At the second level, there will be a wide range of positions and an increasing divergence of views when specific matters containing many diverse elements are discussed.

15. In that context, it would be advisable to establish criteria to determine which of those specific contents constitute areas on which agreement is most likely to be reached. The criteria to be applied could be the extent to which the specific contents are already backed up by an international law tradition on them, their widespread or uniform treatment in various instruments, the expressed will of delegations to make progress or other criteria. Priority should be given to discussion of and agreement on those specific criteria.

16. In the case of specific contents that require wide-ranging discussions, it is advisable to establish specific time frames and, if necessary, additional time frames for their discussion. In any case, such time frames should not be the same as those established for the discussion of priority topics. Such specific contents can be dealt with at the third level.

Third level: innovative contents or contents on which there is considerable disagreement

17. Third-level topics include those on which there is considerable disagreement and on which there is less likelihood that agreement will be reached. Those topics should be considered in the final stages of the negotiations so that they do not affect agreement on a minimum and effective content.

III. Economy

18. Since the time limit for the achievement of the objective is December 2003 and since the terms of reference call for the holding of at least three annual meetings of the Ad Hoc Committee, the establishment of a tentative schedule of meetings and the topics to be discussed at such meetings will make it possible to prepare proposals and set up national work teams in advance.

[1] *Official Records of the Economic and Social Council, 2001, Supplement No. 10* (E/2001/30/Rev.1).

19. Although the scheduling of a maximum number of meetings would afford the greatest opportunities for discussion, Chile considers that a large number of meetings will affect the equal opportunity of all States interested in participating, since attending more than three annual meetings might require considerable expenditure by delegations, in particular delegations from developing countries. Chile therefore considers that agreement should be reached on a schedule of work for 2002 and 2003 taking into consideration the criteria of economy and equal opportunity.

Proposed schedule of work and agenda

20. In the light of the foregoing three criteria, Chile proposes the following tentative schedule of work for 2002 and 2003:

2002

Three meetings:

1. On first-level subjects (topics and concepts, including the drafting of corresponding paragraphs of the future convention).
2. On second-level subjects (specific contents, including the drafting of corresponding paragraphs of the future convention).
3. On second-level subjects (specific contents, including the drafting of corresponding paragraphs of the future convention).

2003

Three meetings:

4. On second-level subjects (specific contents, including the drafting of corresponding paragraphs of the future convention).
5. On third-level subjects (innovative contents or contents on which there is considerable disagreement).
6. Consolidation and final drafting of the text of the convention.

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China: non-paper

1. Following the development of economic globalization, corruption has become increasingly severe and constitutes a major obstacle to economic development and social stability. International cooperation is essential to fight against corruption effectively. China therefore welcomes the preparation of a United Nations Convention against Corruption and is ready to play an active role in the project.

2. The crime of corruption is a problem faced by every State. States attach great importance to the prevention and suppression of the crime of corruption. Bearing in mind the diversity of the social and economic backgrounds and political systems of States, each State should take preventive and suppressive measures based upon its own circumstances and legal system, which, in turn, will enhance the effectiveness of States' efforts to combat corruption. China proposes that, in drafting the convention against corruption, the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex I) be used as a reference. The convention to be drafted may require contracting States, as a matter of principle, to take measures to promote integrity among public officials and to ensure effective prevention, detection and punishment of corruptive activities.

3. At the international level, the main problem in combating corruption is that it remains difficult to extradite fugitives involved in crimes of corruption after they have fled with the proceeds of their crimes. At the same time, it is equally difficult for countries that are victims of corruption to recover the proceeds of crime. This problem has made it possible for persons who have committed crimes of corruption to escape from punishment and to carry on their lives with the proceeds of crimes, which has been having a negative impact on the fight against corruption and even encouraging it. The root causes of the above-mentioned situation are the differences among States' political and legal regimes and the lack of an effective mechanism for judicial cooperation. Therefore the primary task against corruption at the international level is to establish judicial cooperation so as to ensure that offenders,

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wherever they are, are brought to justice and the proceeds of crime are confiscated and returned to the victim countries. Thus, the international harbour for offenders will be eliminated. The future convention against corruption should be aimed at strengthening international judicial cooperation. With that as its main purpose, the convention will include provisions on jurisdiction, judicial assistance, extradition, transfer of sentenced persons, exchange of information, search, seizure and return of proceeds of crime. In that regard, the United Nations Convention against Transnational Organized Crime can also serve as a sound basis.

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Canada: non-paper

1. The issue of "return of assets" will be important in the context of the negotiation of a United Nations Convention against Corruption. In the past, corrupt officials have appropriated massive amounts of state funds for their own use and moved such funds abroad. It is to be expected that a key concern of some States will be to examine how such assets can be returned. Other States have pointed out the evidentiary and legal challenges that may be involved in the return of assets. Discussions have been somewhat complicated by the fact that some have wished to characterize the issue as one of "illegal transfer of funds," while others—including Canada—have noted that the transfer involved is often not illegal and have preferred to speak of "transfer of illicitly obtained funds". It has occurred to the Canadian delegation that one of the reasons the discussion of the issue has been rather unsatisfactory is that the issue described as "return of assets" in fact covers a number of legally separate situations. Some of those situations are legally simpler than others and may be more amenable to agreed international action. The more complex situations may well be subjects worthy of discussion, but it is important to be aware of their complexities. By trying to separate the legal situations, starting at what appears to be the most straightforward legal situation and moving on to progressively more complex matters, Canada hopes that the present paper can help clarify the conceptual framework for discussions on the issue and provide useful food for thought.

1. Theft of state property or funds by high government officials

2. This is a key concern for some countries and is also conceptually the simplest issue. The legal owner of the money or property is the State of origin, the crime that has occurred is theft and the State of origin of the official is the clear victim of the crime. Most legal systems will acknowledge that stolen property should normally be returned to its rightful owner and will contain provision for doing so: those

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provisions may be part of the State's civil, administrative or criminal law system. The fact that the rightful owner is a foreign State should not prevent the return of such property. The theft will usually take place in only one jurisdiction. The transfer of the property from the State of origin may be either legal or illegal, but movement of the property outside its State of origin—rather than the nature of the crime or of the transfer—will be the source of the international aspect of the case.

Challenges

3. There may well be evidentiary challenges in showing that the property claimed is indeed the stolen property of a foreign Sate. All legal systems will require proof that property is stolen before they can attempt to return it to its owner. Proof of ownership by the foreign State may be difficult, especially if the stolen property or funds have been mingled with property from other sources. Some of the stolen funds may be dispersed and there may be other legitimate claimants on the property or funds remaining. The principle that stolen property should be returned to its owner should be generally acceptable, however.

2. Proceeds of corruption (bribes, etc.) obtained by high government officials

4. This situation is more complex. The property is not usually stolen, but is rather illicitly obtained property or funds, which will usually have been given willingly to the corrupt official by the original owner. The original owner has probably engaged in a crime by offering the bribe. In that respect such proceeds of criminal activities more closely resemble illicit drug money than stolen property. In many situations, the State of origin of the official can be regarded as a victim of the crime, in the sense that law and good governance are undermined, but there may be other victims, such as those who lose business they would otherwise have won because they would not pay a bribe; individuals who must pay bribes to obtain services that should legally be freely available; or the persons paying the bribe may even attempt to argue that the money was extorted and that they are the victims. In addition to the transnational movement of the property, which may be licit or illicit, the crime itself may have a transnational aspect, with a bribe offered or paid abroad or by a foreign-based person or enterprise.

Challenges

5. The funds or property located might usefully be viewed in the same context as drug money: both the official and the original owners are malefactors. There may evidentiary challenges in proving that funds are the proceeds of corruption. If proved, however, neither the official nor the person who paid the bribe—the original legal owner—should obtain the property. However, just as the identity of the victim may differ depending on the fact pattern, the final recipient of those proceeds may vary. In most countries, the proceeds of crime will revert to the State following prosecution. There may be legitimate claimants on the property of the official (unpaid employees or other creditors) unconnected with the crime who may have the opportunity to enforce their claim. As well, many States have legal provision for sharing such proceeds with other States, usually on the basis of assistance in the prosecution of the crime. Models relating to the freezing, seizure and sharing of

proceeds of crime could be useful models to examine in the context of this type of proceeds of corruption.

3. Proceeds of contracts corruptly obtained from a domestic or foreign official

6. This situation is more complex. In most States, active bribery—the offering of a bribe to a domestic official—is a crime and in a number of States the offering of a bribe to a foreign official is also a crime. However, not all States deal with the proceeds of illicitly obtained contracts as proceeds of crime in the same manner as, for example, drug money. The funds involved are on the face of things the proceeds of a legal contractual activity: the manner of obtaining the contract is, however, illicit. If the corruptly obtained contract is not fulfilled, is fulfilled in a substandard manner or was unnecessary, the State of origin of the official can, as in the case above, be regarded as the victim. Competitors who have lost business because of an unwillingness to pay bribes may also be regarded as victims. A corporation involved in such a contract may argue that it is not responsible for the illegal activities of its employees or agents and present itself as a victim to the extent it is subject to sanction. In the case of active bribery of a domestic official, the matter may have a transnational aspect to the extent the funds involved are transferred from their country of origin. If funds are transferred, they may be transferred legally or illegally. In the case of active bribery of a foreign official, there is by definition a transnational aspect.

Challenges

7. The evidentiary challenges related to identifying proceeds of corruptly obtained contracts may be very great, as the funds may often be co-mingled with the proceeds of legitimately obtained contracts. This will be additional to the evidentiary burden to be met in proving the active bribery. To the extent that a corporation is involved, difficult issues of corporate criminal or administrative responsibility may arise. To the extent that one is dealing with an ongoing business, in the normal course of commercial life there will be numerous other claimants on the assets of such a business. To the extent that States choose to deal with the proceeds of corruptly obtained contracts as proceeds of crime, most of the comments in section 2 above apply.

4. Corruption of a private person with a duty to another private person

8. In the case of the bribery or corruption of an agent or employee by a third person, it is not clear that any State will have a claim on the property involved. The matter may be dealt with under private law, as a breach of contract or of fiduciary duty, and in many situations the principal or employer will have a claim on the assets involved. If the individual who has accepted bribes is prosecuted, he or she may be fined by the State prosecuting. In such a circumstance, the bribes paid may also be regarded as proceeds of crime. The victim is the private person or corporation to whom the corrupt employee or agent owed a duty. That person may be a national of a foreign State. The crime may also have a transnational aspect if

the bribe is paid from abroad or the money obtained is moved to another country. If funds are transferred, they may be transferred legally or illegally. However, given that the relationships involved are private ones, it is not clear that a transnational aspect to such corruption and its proceeds is a key consideration.

Challenges

9. Evidentiary issues can be complex and some States will approach this as primarily a private law issue. However, an important question to be asked in the context of such "private-to-private corruption" is whether the issue of return of assets, with its focus on the interest of a State other than the State in which the funds or property are found, has any application. Are the interests involved primarily those of private individuals who can pursue them individually?

Comments

10. The present paper is offered as food for thought, in the hope that it can help identify areas in the discussion on "return of assets" where progress can be made most easily. This may be simplest where there is a clear property interest in the assets by the State of origin of the corrupt official. Where the property interest is less clear and where there are more legitimate third-party claimants, an approach based on models dealing with proceeds of crime may prove fruitful. In every situation, evidentiary issues will be of key importance. Depending on the facts and the type of corrupt activity that has generated the assets, the identification of victims may be more or less complex. Even where victims are identified, justice systems do not offer compensation to victims of crime in all circumstances. Finally, the present non-paper is presented by Canada in the hopes that it will encourage discussion on the issue in the future, including of other approaches to the issue of return of assets not followed here.